

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	

**COMMENTS OF CTIA–THE WIRELESS ASSOCIATION®**

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## TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY .....	1
II. CONTRIBUTIONS SHOULD BE ASSESSED IN A MANNER THAT IS FAIR, EFFICIENT, AND SIMPLE .....	5
A. Reforms Should Not Unreasonably Distort the Competitive Marketplace and Should Minimize Administrative Complexity .....	5
B. A Range of Contribution Methodologies May Be Viable .....	8
C. The Commission Can Simplify the Allocation of Revenues Between Jurisdictions By Lowering the Wireless Safe Harbor .....	10
D. The Wholesale Revenue Process Is Costly and Complex .....	11
III. THE FCC CAN TAKE NEAR-TERM STEPS TO IMPROVE THE ADMINISTRATION OF THE CURRENT USF CONTRIBUTION SYSTEM .....	13
A. The Process for Updating the Telecommunications Reporting Worksheets Must Be Fixed .....	13
B. Reducing the Frequency of Adjusting the USF Contribution Factor Would Help Minimize Customer Confusion and Fluctuations in the Factor .....	17
C. There Is Room to Improve Oversight and Accountability .....	18
D. The Filing Deadlines For Revisions to the FCC Form 499-A Should Be Symmetrical .....	20
IV. IMPOSING CONTRIBUTION BURDENS ON TEXT MESSAGING WOULD VIOLATE THE REFORM GOAL OF MINIMIZING COMPETITIVE DISTORTIONS .....	22
V. THE RECOVERY OF USF CONTRIBUTIONS FROM END USERS IS ADEQUATELY REGULATED .....	27
A. There Is No Need For Additional Regulation of USF-Related Line Item Charges on End User Bills .....	27
B. Service Providers Should Not Be Required To Segregate Their USF Charges Into Dedicated Trust Accounts .....	30

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To: The Commission

**COMMENTS OF CTIA–THE WIRELESS ASSOCIATION®**

**I. INTRODUCTION AND SUMMARY**

CTIA–The Wireless Association® (“CTIA”)<sup>1</sup> provides these comments on the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding.<sup>2</sup> As CTIA explains in these comments, the Commission should strive for a contribution system that is fair, efficient, and simple. This may be achievable through a range of methodologies and CTIA is committed to working with the Commission and other stakeholders to achieve a result that satisfies these goals. In the near-term, CTIA identifies a number of improvements that can be made to the administration of the current system. CTIA also cautions the Commission not to adopt proposals that would violate competitive and technological neutrality, such as imposing disparate contribution obligations on functionally equivalent text

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<sup>1</sup> CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

<sup>2</sup> *Universal Service Contribution Methodology, A National Broadband Plan for Our Future*, WC Docket No. 06-122, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, FCC 12-46 (rel. April 30, 2012) (“FNPRM”).

messaging services, or adopting unnecessary and burdensome additional regulation concerning the recovery of universal service contributions.

As the FNPRM acknowledges, the current contribution system suffers from several well-documented drawbacks, including requiring contributors to allocate revenues among categories that are increasingly irrelevant in today's communications marketplace – interstate versus intrastate, telecommunications versus information services, and reseller versus end user. In addition, the communications market continues to evolve towards converged and Internet-based services, and bundled offerings that include both assessable and unassessable services are increasingly common. The emergence of these offerings is a boon to consumers, but also creates challenges for the Commission in defining an appropriate and nondiscriminatory contribution system, particularly within the confines of the existing statute.

In light of these problems, CTIA has been an active participant in past Commission efforts to reform the contribution methodology and has previously developed proposals to inform the Commission's investigation of methodologies based on numbers and connections.<sup>3</sup> CTIA appreciates the Commission's careful investigation of these options, including the FNPRM's discussion of potential changes to a revenue-based system that may address identified problems. CTIA is open to considering a range of contribution methodologies, as long as they address the fundamental problems in the current regime, and provide for a fair, efficient, and simple contribution mechanism.

There are a number of reforms that the Commission can consider in the near term to help ensure that the contribution mechanism is more fair, efficient, and simple, including:

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<sup>3</sup> See, e.g., Comments of CTIA – The Wireless Association, WC Docket No. 06-122 (Aug. 9, 2006).

- Lowering the jurisdictional safe harbor for mobile wireless carriers so that it is more consistent with the experiences of service providers;
- Exploring ways to simplify the process for reporting wholesale revenues, which is currently highly burdensome and complex;
- Establishing a notice and comment period for changes to the revenue reporting worksheet and its instructions, and making the final versions available to contributors before the reporting year begins;
- Revising the frequency of revenue reporting and changes to the contribution factor – for example, to an annual basis – to reduce burdens and confusion;
- Establishing performance goals for contributor compliance and Commission review of audit appeals;
- Seeking comment on and setting clearer audit procedures; and
- Harmonizing the deadlines for revisions to contributors’ revenue reports, so that contributors have the same amount of time whether their revisions will result in downward or upward adjustments.

These steps would have an immediate positive impact, further aligning the contribution process with the goals of fairness, simplicity, and efficiency.

While there are a number of positive steps that the Commission can move forward with in the near-term, the Commission should be careful not to take actions that would violate competitive and technological neutrality. Chief among these areas is the Commission’s discussion of text messaging services.<sup>4</sup> As explained below, revenues from text messaging services are unquestionably outside of the universal service contribution base today and, as the Commission considers wholesale revision of its contribution mechanisms, singling out one type of information service, particularly one that is currently evolving, is neither sensible nor

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<sup>4</sup> FNPRM at ¶ 50 *et seq.* CTIA notes that the Commission seeks comment on “text messaging services,” “short message service (SMS),” and “multimedia messaging service (MMS).” CTIA uses these terms interchangeably for purposes of these comments, unless stated otherwise.

consistent with the Commission's stated goals of fairness, efficiency, and competitive and technological neutrality.

Indeed, to the extent that the FNPRM seeks comment on imposing prospective contribution obligations uniquely on text messaging services, this inquiry misses the mark by concentrating on one discrete subset of information services while failing to account for the fundamental ways in which consumer behavior, technology, and business models are changing. Even prior to release of the Commission's FNPRM, there has been an explosion in the number and variety of messaging services available to consumers. In addition to wireless carrier-provided text messaging services (like SMS), consumers can and do regularly choose among a bevy of functionally equivalent options, including services offered by other facilities-based providers (like Comcast's Voice2Go and Time Warner Cable's UltraSmart), as well as "over-the-top," Internet-based services (like email, Facebook, Twitter, Yahoo! Chat, Google+ Messenger, Apple's iMessage, Blackberry Messenger, MySpace Chat, Meebo, Trillian, Beejive, MobileMe, Jabber, WhatsApp, and PingChat, Groupme, QuickPigeon, Pansi, Handcent, Go SMS Pro, and many others).

The Commission was correct to observe that, in considering whether text messaging services should be required to contribute to the USF, it must be careful to guard against "creat[ing] competitive distortions between text messaging service providers and providers that offer applications that allow users to send messages using a wireless customer's general data plan – applications that consumers may increasingly view as a substitute to text messaging."<sup>5</sup> Given this proliferation of messaging services, it is almost axiomatic that imposing universal service contribution obligations solely on one form of text messaging services would violate the

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<sup>5</sup> FNPRM at ¶ 50.

Commission’s proposed fairness principle – not to mention the Commission’s long-standing commitment to competitive and technological neutrality. Rather than focus on one type of information services, or a subset of these services, the Commission should carefully and holistically review changes in consumer behavior and technology, as well as the benefits and pitfalls of different contribution approaches, as it investigates wholesale reform.

Finally, there is no need for additional regulation of USF pass-through charges. Given the complexity of the contribution methodology, it would be infeasible – and ultimately unhelpful – to require contributors to explain to customers what portions of their bill are subject to contribution obligations, or to disclose such information at the point of sale. At the other extreme, disallowing pass-through charges altogether would be bad for competition and openness. Moreover, requiring contributors to segregate pass-through charges in the event of bankruptcy would be far too burdensome given the relatively small harm it would guard against.

## **II. CONTRIBUTIONS SHOULD BE ASSESSED IN A MANNER THAT IS FAIR, EFFICIENT, AND SIMPLE**

### **A. Reforms Should Not Unreasonably Distort the Competitive Marketplace and Should Minimize Administrative Complexity**

As CTIA has argued for many years, the USF contribution methodology must ensure competitive and technological neutrality and minimize burdensome allocation exercises that have no bearing on the marketplace.<sup>6</sup>

In this regard, the Commission’s proposed “fairness” principle is very important to these reform efforts. Indeed, Section 254(d) of the Act, which requires telecommunications carriers to contribute on an equitable and non-discriminatory basis, is rooted in the principle that the USF

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<sup>6</sup> See, e.g., *id.* at 2.

contribution mechanism be fair for all contributors.<sup>7</sup> As the FNPRM notes, the communications marketplace has evolved significantly since the USF program was created in 1997, and now “service providers that once were thought to compete in wholly distinct markets may now compete with each other.”<sup>8</sup> Thus, the contribution methodology must not impose unequal burdens on entities that compete with one another. Moreover, there is now a vast marketplace of similar or substitutable services, the categories of which should not be subject to unequal burdens. For example, as CTIA describes below and as the Commission’s FNPRM acknowledges, the commercial marketplace currently provides a range of competitive alternatives for consumers who wish to use mobile messaging services, from SMS services offered by mobile wireless providers to messaging services provided by facilities-based WiFi providers to so-called “over-the-top” (“OTT”) messaging services. Proposals to place disparate contribution obligations on mobile wireless providers’ text messaging services have the potential to unfairly tilt the competitive playing and unreasonably alter consumer choices in violation of the Commission’s fairness principle, proposed in the FNPRM, and its long-standing approach of competitive and technological neutrality.

Similarly, the Commission should carefully assess the relative burdens imposed on particular segments of the communications industry. The wireless industry in particular has shouldered an increasing share of the burden of funding the USF program, even as the Commission has implemented policies that reduce the support available for the deployment of wireless networks in rural and high-cost areas. As demonstrated in the following chart, wireless carriers and their customers now bear 44 percent of the nine billion dollar USF contribution

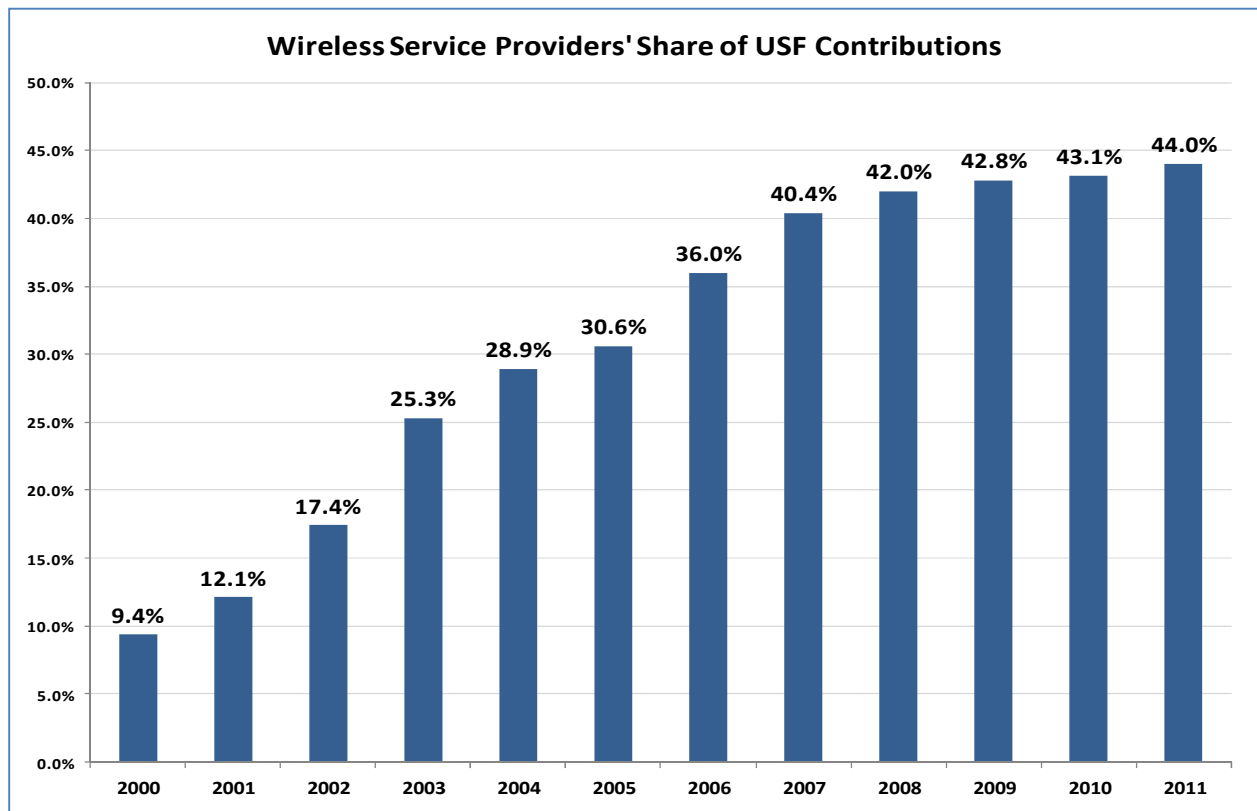
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<sup>7</sup> 47 U.S.C. § 254(d).

<sup>8</sup> FNPRM at ¶ 24.



burden. That is, wireless carriers and their customers collect and contribute nearly \$4 billion per year.



Source: FCC “Telecommunications Industry Revenues, 2009” Report

Imposing additional costs on providers’ services has a real world impact for consumers who have an increasing range of choices available to them. Moreover, mandatory universal service contributions can have a competition-distorting impact when those funds are used to subsidize a competitor. Accordingly, in weighing reform options, the Commission must exercise fairness and ensure that certain service providers and types of services are not favored over others.

Along with non-discrimination and technological neutrality, efficiency and simplicity also are valuable principles for the Commission’s reform efforts.<sup>9</sup> It is well known that the existing contribution system is burdensome and confusing. With the proposed reforms, the

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<sup>9</sup> See *id.* at ¶ 23.

Commission should seek to minimize administrative complexity and simplify processes where possible. This will reduce unnecessary burdens on service providers and USAC, and attendant costs to consumers. A revised contribution methodology can also promote efficiency by reducing opportunities for arbitrage and minimizing current incentives for providers and consumers to favor services and technologies based on relative contribution burden. To improve the efficiency and simplicity of the contribution system, and provide clarity to service providers regarding their contribution obligations, CTIA supports the suggestion that the Commission provide a specific list of services that are subject to universal service contributions.<sup>10</sup>

#### **B. A Range of Contribution Methodologies May Be Viable**

As discussed in more detail below, CTIA is open to considering a range of contribution methodologies, as long as they address the fundamental problems in the current regime, and provide for a fair, efficient, and simple contribution mechanism.

It is well known that the current contribution system requires contributors to allocate revenues among categories that are increasingly irrelevant from the perspective of today's communications consumer. Similarly, bundles that include both assessable and unassessable services are increasingly common in the converging communications and Internet marketplace.<sup>11</sup> Requiring contributors to make these arbitrary distinctions when reporting their revenues for USF purposes creates dead-weight burdens, competitive distortions, and uncertainty.

In light of these considerations, CTIA has actively participated in past Commission efforts to reform the contribution methodology and previously developed proposals to inform the

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<sup>10</sup> *See id.* at ¶ 73.

<sup>11</sup> *See supra* Section I.

Commission's investigation of methodologies based on numbers and connections.<sup>12</sup> As CTIA has previously explained, approaches based on numbers and connections may have the advantage of not relying on artificial regulatory distinctions that are not relevant in the marketplace. Similarly, numbers or connections-based approaches may be simpler to administer and easier for consumers to understand.

At the same time, CTIA has consistently highlighted that any numbers- or connections-based system would have to be designed carefully to fairly treat low-income, wireless pre-paid, and wireless family plan customers.<sup>13</sup> The evolving trend of wireless integration into a host of new products, including mobile machine-to-machine services, and relying on a variety of new business models, also poses new challenges for the Commission in crafting a revised contribution methodology.

CTIA appreciates the Commission's careful investigation of these options, as well as the FNPRM's discussion of potential changes to a revenue-based system that may address identified problems. CTIA is open to considering a range of contribution methodologies, as long as they address the fundamental problems in the current regime, and provide for a fair, efficient, and simple contribution mechanism.

As described below, there are a number of areas that the Commission can explore in the near term to improve the existing revenue-based methodology, as well as a number of administrative improvements that can be made to improve the collections process without regard to the specific basis for contribution.

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<sup>12</sup> See, e.g., Comments of CTIA, WC Docket No. 06-122, at 19-20 (filed Nov. 26, 2008).

<sup>13</sup> See *id.* at 19-20.

**C. The Commission Can Simplify the Allocation of Revenues Between Jurisdictions By Lowering the Wireless Safe Harbor**

The Commission should minimize the extent to which contributors must make artificial revenue allocations between jurisdictions. A useful step that the Commission could take to accomplish this goal would be to lower the wireless safe harbor to a more realistic level so that more mobile wireless filers can avail themselves of it.

Allocating revenues on jurisdictional lines is becoming increasingly difficult and now has little relevance from the perspectives of customers and carriers. For much of the traffic today, particularly traffic that originates or terminates on mobile services or nomadic VoIP and other computer applications, neither the consumer nor the carrier is likely to know whether a call originates and terminates in the same state. For such calls, the originating and terminating telephone numbers are likely to be of little practical value in identifying the end points of the communication. For this large and growing share of traffic, the exercise of assigning a jurisdiction is performed solely for regulatory purposes.

As a result, at a minimum, the Commission should simplify this process by revisiting its safe harbors for allocating mobile wireless revenue between jurisdictions. As the Commission acknowledges in the FNPRM, the majority of wireless providers conduct traffic studies rather than taking advantage of the Commission's safe harbors because the safe harbors simply are not realistic.<sup>14</sup> For example, the wireless safe harbor for cellular and broadband PCS telecommunications revenues stands at 37.1 percent, and yet the Commission's data show that over three-quarters of wireless carriers filing traffic studies demonstrate that only 10 percent to 29 percent of their traffic is interstate.<sup>15</sup>

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<sup>14</sup> See FNPRM at ¶ 124 & Chart 3.

<sup>15</sup> *Id.*

The Commission's safe harbors were intended to promote simplicity and efficiency within the revenue-based methodology, yet the evidence suggests that they are not serving their intended purpose. The Commission therefore should consider lowering the safe harbors to levels more consistent with the experience of mobile wireless carriers. The Commission could use the information it has gleaned from reviewing wireless carriers' traffic studies to arrive at reasonable safe harbor figures. More fact-based wireless safe harbors would reduce burdens on carriers because they would no longer have to conduct and document traffic studies, as well as on USAC and the Commission because they would no longer need to review them.

**D. The Wholesale Revenue Process Is Costly and Complex**

The current system, basing contributions on "end-user" revenues and requiring wholesale customers to provide reseller certifications, is burdensome and increasingly complex. As the FNPRM points out, providing and obtaining certifications becomes fraught "where the customer of the wholesale provider provides both assessable and non-assessable services to its retail customer."<sup>16</sup> The current process also becomes particularly complex where there are multiple resellers in a value chain leading to an end-user service.

The value-added assessment process discussed in the FNPRM shows some promise for addressing these issues,<sup>17</sup> although the Commission would need to consider further how such a system would work before moving forward to adopt it. For example, under the proposal, contributors would receive a credit for telecommunications services or telecommunications purchased from other contributors. The Commission would need to consider thoroughly how

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<sup>16</sup> *Id.* at ¶ 148.

<sup>17</sup> *See id.* at ¶¶ 149-161.

such purchases would be tracked, how much of a burden the tracking process would impose, and whether this additional burden would outweigh the benefits.

On the other hand, it appears that a valued-added system would not require any contributor to police other contributors' compliance with the reporting obligations. This would be a notable improvement over the current system, which requires contributors to obtain reseller certifications and check the Commission's website to confirm the filing status of all wholesale customers every quarter.<sup>18</sup>

If the reseller certification regime is retained, a modification that would promote the Commission's goal of efficiency would be to streamline the requirement such that contributors would obtain a reseller certificate just once, at the initiation of service to a wholesale customer, but check the contributor's status on the FCC's website annually. This would be significantly less burdensome than the current requirement that all contributors obtain a certification from their reseller customers annually and verify the validity of that certification quarterly.

The Commission, in any event, should reject the FNPRM's proposals to modify the reseller certification process to include greater specificity regarding the specific use of sub-parts of the services that one contributor purchases from another.<sup>19</sup> These proposals all appear to make the process more cumbersome than it already is, and thus run contrary to the goals of efficiency and simplicity.

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<sup>18</sup> See 2012 Telecommunications Reporting Worksheet Instructions (FCC Form 499-A), at 22 (Feb. 2012) ("Instructions").

<sup>19</sup> See FNPRM at ¶¶ 162-75.

### **III. THE FCC CAN TAKE NEAR-TERM STEPS TO IMPROVE THE ADMINISTRATION OF THE CURRENT USF CONTRIBUTION SYSTEM**

CTIA supports the Commission's efforts to improve the administration of the USF contribution system. Indeed, the success of any comprehensive contribution reforms that ultimately are adopted in this proceeding will be thwarted if the administrative mechanisms that implement the system are not transparent, clear, efficient and effective. Accordingly, the Commission should act in the near-term to revise its procedures for updating the FCC Forms 499-A and 499-Q Telecommunications Reporting Worksheets (the "Worksheets") and related Instructions, adopt rules to reduce the wide fluctuations in the USF contribution factor, take steps to improve the oversight and accountability of the contribution mechanism, and make the requirements for amending the FCC Form 499-A Worksheets consistent and symmetrical.

#### **A. The Process for Updating the Telecommunications Reporting Worksheets Must Be Fixed**

As CTIA explains below, the Commission should adopt a formal notice and comment process for updating the Telecommunications Reporting Worksheet and its Instructions and should release any such revisions prior to the relevant reporting period.

The Wireline Competition Bureau ("Bureau") historically has updated the Worksheets and Instructions each year, typically within one to two months prior to the April 1 filing deadline for the FCC Form 499-A Worksheet. In 2007, the Bureau began issuing Public Notices with the updated Worksheets and Instructions listing the revisions so that service providers no longer had to parse each line of the newly released documents to find the updates.<sup>20</sup> The Instructions, in particular, are heavily relied upon by the industry, USAC and the Commission for purposes of determining whether a company is complying with the Commission's USF reporting and

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<sup>20</sup> Since the release of the initial FCC Form 457 (the predecessor to the FCC Form 499-A) in 1997, the length of the FCC Form 499-A Instructions has doubled from 18 pages to 36 pages.

contribution requirements.<sup>21</sup> But under the current processes, parties have no opportunity to review or comment on the changes until after they have been released, at which time service providers are expected to comply with them after the fact.

According to the FNPRM, the Bureau makes only “non-substantive” modifications to the Worksheets and Instructions to reflect new Commission rules or requirements and to provide guidance on issues of rule interpretation.<sup>22</sup> But the communications marketplace is constantly evolving, and new services, technologies and business practices are introduced regularly. The Bureau’s efforts to “clarify” the contribution obligations that apply to new services and technologies (particularly since the Commission usually has not formally addressed the issues) have led to confusion and errors.<sup>23</sup> In some cases the revisions appear to conflict with industry practice or prior Commission rules or guidance.<sup>24</sup>

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<sup>21</sup> See FNPRM ¶ 345; see also, e.g., *Kajeet, Inc. & Kajeet/Airlink, LLC*, Notice of Apparent Liability for Forfeiture and Order, 26 FCC Rcd 16684, 16691 n.58 (2011) (explaining that a company should have started filing quarterly Worksheets when it acquired the assets of a telecommunications carrier because the Instructions for the quarterly Worksheets set forth directions for filing when a contributor is acquired).

<sup>22</sup> See FNPRM at ¶ 345.

<sup>23</sup> For example, the Bureau’s revisions to the 2009 Instructions included for the first time Multi-Protocol Label Switching (“MPLS”) service in the list of telecommunications services subject to USF contribution, although the Commission had not formally addressed whether enterprise communications services such as MPLS were telecommunications services or subject to USF contributions. *Wireline Competition Bureau Announces Release of the Revised 2009 FCC Form 499-A and Accompanying Instructions*, Public Notice, 24 FCC Rcd 2424 (2009). Several parties questioned the legality of the Bureau’s classification of MPLS as a telecommunications service. See, e.g., Masergy Communications Inc. Petition for Clarification, or in the Alternative, Application for Review, WC Docket Nos. 06-122, 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116 (filed March 27, 2009); Comments of AT&T Inc., WC Docket No. 06-122 (June 8, 2009); Comments of BT Americas Inc.; WC Docket No. 06-122 (June 8, 2009). The Bureau subsequently issued a letter to USAC clarifying that the inclusion of MPLS to the list of telecommunications services in the Instructions was merely intended to be an illustrative example of services that may be subject to contribution. Letter of Jennifer K. McKee, Acting Chief, Telecommunications Access Policy Division, Wireline Competition Bureau, FCC, to Michelle Tilton, Director of Financial Operations, USAC (Apr. 1, 2009). Despite this, USAC subsequently concluded in at least one audit of a service provider that MPLS is subject to USF



Contributors have challenged the validity of some of these revisions as substantive requirements adopted without the notice and comment mandated by the Administrative Procedure Act (“APA”).<sup>25</sup> Even without opining on their legal status, it is clear that the Worksheets and Instructions serve a key role within the functioning of the USF mechanism, and changes to these documents can have a significant impact on contributors’ reporting and contribution obligations and how they fulfill those responsibilities. As a legal matter, to the extent any revisions to the Worksheets or Instructions constitute substantive rules, they are subject to the notice and comment requirements under the APA. Thus, for such revisions to be valid, the Commission must provide a notice-and-comment process.

Even to the extent that the Worksheet or Instructions do not constitute substantive rules, or in the case of non-substantive revisions, establishing formal procedures for notice and comment would help ensure that the USF reporting and contribution process is more transparent, equitable, and efficient.<sup>26</sup> For example, commenters can provide valuable insight regarding the potential impact of any proposed revisions, which would help ensure that the revisions reasonably can be implemented by service providers and that they accurately reflect market conditions before they go into effect. Moreover, it would provide contributors with the ability to seek clarification about the terms and scope of the proposed revisions in a proactive, rather than

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contribution without evaluating whether the service was an information service as the service provider claimed. *See* Request for Review by XO Communications Services, Inc. of a Decision of the Universal Service Administrator, WC Docket No. 06-122 (Dec. 29, 2010) (challenging USAC’s reclassification of MPLS revenues).

<sup>24</sup> *See, e.g.*, Request for Review by AT&T Inc. of Decision of the Universal Service Administrator, at 17-19, CC Docket No. 96-45 (Oct. 10, 2006) (highlighting inconsistencies in the Worksheets and Instructions concerning the reporting practices with respect to prepaid calling cards).

<sup>25</sup> 5 U.S.C. 551 *et seq.*

<sup>26</sup> The Commission already has in place a similar process for updating the list of services that are eligible for support under the E-Rate Program. *See* 47 C.F.R. § 54.522.

reactive, way so that contributions can be accurately collected. Thus, the opportunity for notice and comment could ease confusion and provide clarity and consistency in reporting practices, and reduce the number of complaints and challenges to the revisions that are ultimately adopted by the Bureau.

Because the Worksheet and Instructions have such a significant impact on contributors' obligations, recordkeeping, and other behavior, the Bureau should provide as much advance notice as possible of revisions to the Worksheets and Instructions – but in any event such *revisions should be released prior to the relevant reporting period.*<sup>27</sup> Under existing procedures, the Bureau typically releases the FCC Form 499-A and Instructions between the *end* of the relevant reporting period and the April 1 filing deadline for that period. Consequently, service providers do not have access to the Worksheet Instructions while they are required to track and compile the data for the Worksheets. This can make it impossible for even diligent filers to report accurately, and it can lead unnecessarily to inconsistent reporting by service providers, as well as questions, problems and audit difficulties. Indeed, the updated Worksheets and Instructions can impact a service provider's record-keeping practices, the relationships and agreements between vendors and customers, and the identity of customers that receive pass-through USF contribution charges, among other things.

Therefore, the Commission should give service providers sufficient advance notice of the updated Worksheets and Instructions so that they may implement any necessary changes to their internal business practices for the reporting period. Any revisions to the Worksheet or Instructions should be available before the beginning of any reporting period.

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<sup>27</sup> See FNPRM at ¶ 347.

**B. Reducing the Frequency of Adjusting the USF Contribution Factor Would Help Minimize Customer Confusion and Fluctuations in the Factor**

CTIA encourages the Commission to revise the frequency of contribution factor adjustments in order to reduce burdens on contributors, to reduce confusion for consumers, and to fluctuations in the factor.

As noted in the FNPRM, the USF contribution factor is subject to significant fluctuation between quarters.<sup>28</sup> These fluctuations have a substantial impact on service providers and consumers alike. Service providers must continually make billing and administrative adjustments to recover the allowed USF contribution amounts from their end users. These adjustments in turn can result in variations in customers' monthly bills, which can lead to confusion and frustration on the part of end users, many of whom inevitably contact their service providers to inquire about the charges. The volatility of the contribution factor also can make it difficult for service providers to estimate their USF contribution obligations over the long term, and for customers to estimate and budget for the total cost of their communications services. Thus, to the extent the Commission ultimately retains a revenues-based USF system or adopts an alternative system that utilizes a contribution factor, the factor should be revised less frequently, such as on an annual basis, to help reduce these fluctuations.

An annual contribution factor also would be administratively less burdensome. USAC would no longer need to calculate and adjust the contribution factor each quarter. In addition, the Commission should be able to ease or entirely eliminate the requirement for service providers to file quarterly revenue reports, reducing the administrative burdens on service providers and USAC alike.

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<sup>28</sup> See *id.* at ¶¶ 351-52.

Annual contribution factors already are used successfully in the Commission’s support mechanisms to fund interstate telecommunications relay services (“TRS”), the administration of the North American Numbering Plan (“NANP”), and the shared costs of local number portability administration (“LNP”), and CTIA sees no reason why an annual contribution factor could not similarly be used in the USF context.<sup>29</sup>

To the extent the Commission does not reduce the frequency of adjustments to the USF contribution factor, it should explore whether spreading any prior-period adjustments over a long period of time – at least the two subsequent quarters – would reduce the volatility of the factor.<sup>30</sup> The Commission’s analysis of the contribution factors over the last seven years shows that increasing the adjustment period from one to two quarters would have reduced the amount and severity of the fluctuations from one period to the next.<sup>31</sup> Specifically, the increases and decreases currently seen in the contribution factor would average out, providing a more stable contribution factor over the long term.

### **C. There Is Room to Improve Oversight and Accountability**

CTIA recommends that the Commission take several steps to improve oversight and accountability over the contributions process, including: 1) adopting performance goals for compliance with contribution obligations and for Commission review of contributor audit appeals, 2) directing USAC to produce an updated Beneficiary/Contributor Compliance Audit Program (“BCAP”) plan to ensure that audits reflect the contribution reforms adopted by the Commission, and promptly seeking comment on this plan; 3) establishing procedures that ensure

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<sup>29</sup> As noted in the FNPRM, reserve funds could be used as necessary to meet quarterly fluctuations caused by increased and decreased demands on the USF program. *See* FNPRM at ¶ 354.

<sup>30</sup> *See id.* at ¶ 356.

<sup>31</sup> *See id.* at ¶¶ 357-58.

that requests for review of USAC audit decisions are resolved in a timely fashion, including a mechanism to declare requests for review of USAC decisions to be resolved in favor of the petitioner after a reasonable period of time; and 4) by making the deadlines by which contributors must submit revisions to their FCC Form 499-A Worksheets symmetrical.

CTIA agrees with the Commission that, while increasing administrative efficiency and reducing the cost of compliance are important, it also must ensure that service providers remain accountable for complying with the USF contribution rules. Entities that do not contribute their required share to the USF gain an unfair competitive advantage over contributors that abide by the Commission's rules. Adopting a performance goal of reducing the number of service providers that do not satisfy their contribution obligations, as the Commission proposes, would help track the Commission's efforts to ensure compliance and determine if and when additional compliance measures may be necessary.<sup>32</sup>

The audits conducted by the Commission and USAC, in particular, play a key role in helping ensure compliance with USF requirements. There is a long history, however, of complaints and concerns regarding the audit process. It is essential that audits be conducted using a uniform set of guidelines. In this case, the Commission can improve the process by directing USAC to produce an updated Beneficiary/Contributor Compliance Audit Program ("BCAP") plan to the Commission's Office of Managing Director and the Bureau to help ensure that audits reflect the contribution reforms adopted by the Commission.<sup>33</sup> In addition, the Commission should put the proposed plan out for public comment because, as with revisions to the Worksheets and Instructions, feedback from interested parties could help improve the audit process.

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<sup>32</sup> See *id.* at ¶ 368.

<sup>33</sup> See *id.* at ¶ 372.

In addition, CTIA urges the Commission to establish procedures that ensure that requests for review of USAC audit decisions are resolved in a timely fashion. While the Commission has in place a rule requiring that requests for review be resolved within 90 days, this is clearly not sufficient. Rather, the deadline is routinely missed and many requests for review of USAC contribution-related decisions remain pending after many years.<sup>34</sup> It is damaging to the efficient and effective functioning of the contribution mechanism (and, indeed, the entire USF program) that these requests for review are not resolved promptly. Service providers are left in limbo while their requests remain pending, and the issues and questions raised in the requests for review remain unresolved. Depending on the amount at stake, this can affect contributors' other financial reporting. Acting promptly on requests for review would provide much needed guidance and clarity to all contributors as well as to USAC, which in turn will increase the efficiency and effectiveness of the USF program. Since a rule has proven to be insufficient, the Commission should consider a provision akin to the forbearance statute,<sup>35</sup> declaring requests for review of USAC decisions to be resolved in favor of the petitioner after a reasonable period of time (such as six months).

**D. The Filing Deadlines For Revisions to the FCC Form 499-A Should Be Symmetrical**

The Commission can improve the fairness of the USF contribution system by making the deadlines by which contributors must submit revisions to their FCC Form 499-A Worksheets symmetrical. Granting contributors the same amount of time to file revised forms – without

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<sup>34</sup> See, e.g., Letter from David B. Cohen, USTelecom – The Broadband Association, to Marlene H. Dortch, Secretary, FCC, at 4-5, WC Docket No. 06-122, CC Docket No. 96-45, GN Docket No. 09-51 (Mar. 28, 2012) (listing a variety of long-pending USAC audit appeals that date back to 2004).

<sup>35</sup> 47 U.S.C. § 160(c).

regard to whether their revisions will result in downward or upward adjustments – would be a more equitable and administratively efficient approach.

In 2004, the Bureau adopted an order establishing a 12-month limit on the period in which a service provider can file revisions to its FCC Form 499-A Worksheet if the revisions would result in a *decrease* of its regulatory fees or contributions to the support mechanisms for USF, TRS, LNP and NANP.<sup>36</sup> The Bureau described the change as a non-substantive procedural change that would “help ensure the stability and sufficiency” of the USF, “improve the integrity” of the USF contribution system and “promote efficiency in administration” of the USF program by “reduc[ing] substantially the need for adjustments regarding a given contribution year, providing certainty to contributors and their customers.”<sup>37</sup>

The Bureau, however, did not adopt a similar timeframe for revisions that would *increase* a service provider’s fees or contribution amounts. Thus, there is no time limit on the requirement to file a revised Form 499-A Worksheet if it would lead to an upward adjustment in a service provider’s contribution amount.

The Bureau’s decision was widely challenged on the basis that the Bureau did not have authority to adopt a new substantive rule, the rule would distort behavior and create anti-competitive incentives, the rule would not provide certainty to contributors or customers, administrative efficiency would not be significantly furthered, and the rule was arbitrary and capricious.<sup>38</sup> Seven years later, the Commission has yet to resolve these critical issues. Such

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<sup>36</sup> *Federal-State Joint Board on Universal Service*, Order, 20 FCC Rcd 1012 (WCB 2004).

<sup>37</sup> *Id.* at 1016-17.

<sup>38</sup> See, e.g., Business Discount Plan, Inc. *Application for Review*, CC Docket Nos. 96-45, 98-171, 97-21 (Jan. 10, 2005); Qwest Communications International Inc., *Application for Review*, CC Docket Nos. 96-45, 98-171, 97-21 (Jan. 10, 2005); SBC Communications Inc., *Application for Review*, CC Docket Nos. 96-45, 98-171, 97-21 (Jan. 10, 2005); Sprint Corporation, *Petition for Reconsideration*, CC Docket Nos. 96-45, 98-171, 97-21 (Jan. 10, 2005); Comments of Cingular

uncertainty substantially undercuts the Commission’s goals of ensuring that the USF contribution system is clear, efficient and effective.

CTIA urges the Commission to establish a more equitable and symmetrical limitations period for contributors to file revisions to their FCC Form 499-A Worksheets, regardless of whether the revisions result in an upward or downward adjustment of their contribution amounts. As AT&T noted in 2005, “[b]asic equitable considerations require this result to ensure that carriers do not overpay simply because they are time-barred from filing a revised Worksheet for refunds, while being held liable for revisions that would result in increased contributions.”<sup>39</sup>

#### **IV. IMPOSING CONTRIBUTION BURDENS ON TEXT MESSAGING WOULD VIOLATE THE REFORM GOAL OF MINIMIZING COMPETITIVE DISTORTIONS**

As we explain below, revenues from text messaging services<sup>40</sup> are unquestionably outside of the universal service contribution base today and, as the Commission considers wholesale revision of its contribution mechanisms, singling out one type of information service, particularly one that is currently evolving, is neither sensible nor consistent with the Commission’s stated goals of fairness, efficiency, and competitive and technological neutrality.

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Wireless LLC, CC Docket Nos. 96-45, 98-171, 97-21 (Mar. 30, 2005); Comments of AT&T Corp., CC Docket Nos. 96-45, 98-171, 97-21 (Jan. 25, 2005) (“AT&T Filing Deadlines Comments”).

<sup>39</sup> AT&T Filing Deadlines Comments at 4.

<sup>40</sup> CTIA notes that the FNPRM seeks passing comment on whether to apply universal service contributions from revenues derived from common short codes, and strenuously opposes any such proposal. Carrier participation in content provider common short code (“CSC”) marketing arrangements – which enable advertisers or other third party content providers to reach customers by promoting a single five or six digit wireless “short code” as part of a marketing campaign – is far afield from the scope of this proceeding. Indeed, marketing arrangements are not even communications services, broadband or otherwise. *See* Letter from David J. Redl, CTIA – The Wireless Association®, to Marlene H. Dortch, Federal Communications Commission, GN Docket No. 09-191 (June 11, 2010); Comments of CTIA – The Wireless Association®, WC Docket No. 08-7 (Mar. 14, 2008).



As CTIA has previously explained in detail in this docket, SMS, an integrated information service, is not subject to USF contribution obligations under the current contribution methodology.<sup>41</sup> SMS fits squarely within the definition of an “information service” and the precedent interpreting that term.<sup>42</sup> Specifically, SMS messages are stored, processed and transformed by short message service centers. Like e-mail, voicemail and voice storage and retrieval services, all which the Commission has long held to be information services, data storage is a key feature of SMS.<sup>43</sup> Moreover, SMS messages routinely involve net protocol conversion, which can occur when messages are sent from one wireless network to another carrier’s network or to an email or instant messaging account.<sup>44</sup> The form and content of SMS

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<sup>41</sup> See, e.g., Comments of CTIA – The Wireless Association, WC Docket No. 06-122, at 7-13 (June 6, 2011) (“CTIA SMS Comments”); Reply Comments of CTIA – The Wireless Association, WC Docket No. 06-122, at 3-7 (June 20, 2011) (“CTIA SMS Reply Comments”).

<sup>42</sup> The Act defines an information service, in relevant part, as providing a “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.” 47 U.S.C. §153(24). This definition is essentially identical to the definition of information service in the “Modification of Final Judgment” or “MFJ,” the 1984 consent decree that resolved the government’s antitrust case against AT&T. See *United States v. AT&T*, 552 F. Supp. 131, 179 (D.D.C. 1982) (subsequent history omitted). It also is consistent with the Commission’s even earlier definition of “enhanced services,” which the Commission has long held to be the equivalent of information services. See 47 C.F.R. § 64.702(a).

<sup>43</sup> *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11538-39 (1998) (“*Stevens Report*”) (concluding that e-mail is an information service); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21975 (1996) (subsequent history omitted) (“*Non-Accounting Safeguards Order*”) (concluding that telemessaging is an information service); *United States v. Western Electric Co., Inc.*, 627 F. Supp. 1090, 1110 n.89 (D.D.C. 1986) (subsequent history omitted) (noting that voice storage services are features that allow subscribers to store, retrieve, and send messages).

<sup>44</sup> See, e.g., *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-58 (stating that services involving protocol conversion are information services because they perform the transforming and processing of information); *Stevens Report*, 13 FCC Rcd at 11527 (noting that “services employing protocol processing were treated as information services under the MFJ”).

messages also are subject to substantial computer processing and conversion. In addition, SMS allows customers to interact with stored information and content. Such information retrieval has long been considered an enhanced or information service.<sup>45</sup> The protocol conversion, computer processing, data storage, and information retrieval functions involved in SMS cannot be separated from its transmission functionality, making SMS an integrated information service that is not subject to the mandatory USF contribution obligations set forth in Section 254(d) of the Act.<sup>46</sup> Indeed, CTIA and several other commenters have shown that SMS is analogous to e-mail,<sup>47</sup> which as noted above has long been classified by the Commission as an information service.

To the extent that the FNPRM seeks comment on imposing prospective contribution obligations on text messaging services, this inquiry fails to account for the fundamental ways in which consumer behavior, technology, and business models are changing. The consumer benefits of text messaging services can be seen through the explosion in number and variety of

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<sup>45</sup> See, e.g., *U. S. WEST Communications, Inc. Petition for Computer III Waiver*, 11 FCC Rcd 7997, 8003 (CCB 1996) (finding that providing “access to a database for purposes other than to obtain the information necessary to place a call will generally be found to be an enhanced service”); *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd 5986, 5988 (1987) (concluding that a “Talking Yellow Pages” offering is an enhanced service); *North American Telecommunications Association*, 101 FCC 2d 349, 361 (1985) (classifying voicemail as an enhanced service because of its “subscriber interactions with stored information for the purpose of providing a service which is not a basic transmission channel”).

<sup>46</sup> As CTIA has previously explained, SMS also cannot be classified as commercial mobile radio service and therefore a telecommunications service subject to USF contribution requirements. SMS messages typically are not transmitted on the public switched telephone network, thus SMS is not a “interconnected service” under Section 332(d) of the Act. See CTIA SMS Comments at 13-15; CTIA SMS Reply Comments at 8-11.

<sup>47</sup> See, e.g., CTIA SMS Comments at 22; Comments of AT&T Inc., WC Docket No. 06-122, at 3 (June 6, 2011) (“SMS is indistinguishable from email.”); Comments of Verizon Wireless, WC Docket No. 06-122, at 3 (June 6, 2011) (“Text messaging is effectively a more mobile form of e-mail – and the services are functionally indistinguishable in most respects.”).

messaging services available to consumers. In addition to mobile wireless providers' text messaging services (like SMS), consumers can and do regularly choose among a bevy of functionally equivalent options, including services provided by other facilities-based providers (like Comcast's Voice2Go and Time Warner Cable's UltraSmart), as well as over-the-top, Internet-based services (like email, Facebook, Twitter, Yahoo! Chat, Google+ Messenger, Apple's iMessage, Blackberry Messenger, MySpace Chat, Meebo, Trillian, Beejive, MobileMe, Jabber, WhatsApp, and PingChat, Groupme, QuickPigeon, Pansi, Handcent, Go SMS Pro, and many others). These services are provided through an evolving variety of business models.

The unregulated status of messaging services has had major public policy and consumer benefits that the Commission must recognize. Services like SMS provide a versatile messaging and data retrieval service used by millions of mobile customers. SMS and other messaging providers are meeting consumer demands by facilitating peer-to-peer texting and are developing new and innovative text messaging services.<sup>48</sup>

Moreover, as the Commission considers wholesale revision of its contribution mechanisms, singling out one type of information service, particularly one that is currently evolving, is not sensible. These new and innovative services are expanding the reach of mobile broadband benefits. To focus on these information services, or a subset of these services, does not make sense as the Commission considers wholesale review of the contribution mechanism.

CTIA recognizes the Commission's goal of expanding and stabilizing the contribution base, but this must be done in a manner that is competitively and technologically neutral and does not create new, more problematic regulatory disparities. The Commission was correct to observe that, in considering whether text messaging services should be required to contribute to

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<sup>48</sup> For example, such new services include animated messaging and video search, as well as new forms of international messaging.

the USF, it must be careful to guard against “creat[ing] competitive distortions between text messaging service providers and providers that offer applications that allow users to send messages using a wireless customer’s general data plan – applications that consumers may increasingly view as a substitute to text messaging.”<sup>49</sup> It is almost axiomatic that imposing universal service contribution obligations solely on one form of text messaging services would violate the Commission’s proposed fairness principle – not to mention the Commission’s long-standing commitment to competitive and technological neutrality. Rather, as the Commission seeks to develop long-term reform of the contribution methodology, the Commission should carefully and holistically review changes in consumer behavior and technology, as well as the benefits and pitfalls of different contribution approaches, before imposing new and potentially competition-distorting obligations on one discrete set of services.

Moreover, imposing a new contribution requirement on a mobile service would shift onto wireless service providers and their customers even more of the obligation to fund the universal service fund, which now constitutes 44 percent of all universal service contributions. Applying USF contribution obligations solely on text messaging services also would raise a host of unwarranted and unnecessary administrative and compliance questions for SMS providers.

As a result, the Commission should not consider a unique contribution obligation on any mobile messaging services.

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<sup>49</sup> FNPRM at ¶ 50. Indeed, as the Commission itself recognized, treating similar or substitutable services differently can create unintended competitive and market distortions. *Id* at ¶ 24.

**V. THE RECOVERY OF USF CONTRIBUTIONS FROM END USERS IS ADEQUATELY REGULATED**

**A. There Is No Need For Additional Regulation of USF-Related Line Item Charges on End User Bills**

CTIA agrees with the Commission that it is extremely important for customers to understand the charges that are on their telephone bills. The proposals set forth in the FNPRM to improve the transparency relating to the amount of USF contribution charges that are passed through by service providers to their customers, however, would merely increase customer confusion and frustration.<sup>50</sup>

The complexity of the USF contribution mechanism would make it difficult, if not impossible, to explain in a concise and clear manner which portions of a customer's bill are subject to assessment.<sup>51</sup> For example, the assessment of USF charges is based upon legal distinctions (e.g., telecommunications vs. information services) that are irrelevant to most customers. Many customers also purchase bundled offerings that include both assessable services and other non-assessable services and equipment. Similarly, it is common for wireless service providers to charge flat fees for calling plans that include both intrastate and interstate traffic, then use the Commission-established safe harbor or traffic studies to estimate the amount of revenues that are deemed interstate. Attempting to identify the portions and amounts of the offerings that are subject to USF charges and explain how the contribution pass-through amounts were calculated would be severely challenging for service providers (if even possible) and very confusing to customers.

Moreover, in light of the complexity of the USF contribution system, identifying the elements of a customer's bill that are subject to USF charges and explaining how the service

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<sup>50</sup> See FNPRM at ¶¶ 390-95.

<sup>51</sup> See FNPRM at ¶ 390.

provider calculates those charges would not help consumers make more informed choices regarding their services or determine whether their service providers are properly assessing the USF pass-through charges.<sup>52</sup> And, as noted above, to the extent a service provider decides to pass through the USF contributions to their customers, the charges are not allowed to exceed the USF contribution factor for the relevant period. Therefore, the USF charges should be generally consistent across those service providers that pass charges through to end users. This proposed disclosure would be rendered even more complex and confusing given the constantly changing quarterly USF contribution factor.

For the same reasons discussed above, it also would be infeasible to require service providers to advertise or otherwise disclose at the point-of-sale the amount of the quoted rate (or other assessable units) that would be subject to USF contributions.<sup>53</sup> In addition, the wide variety of distribution channels would make such point-of-sale disclosures impractical. For example, kiosks, on-line, and big-box stores may be forced to list a rate that differs for each of the carriers whose products they are offering, causing additional confusion for consumers.

Furthermore, the Commission should not limit the flexibility of service providers – including providers of both post- and prepaid services – to recover their USF contributions from customers through line-item charges.<sup>54</sup> Setting competitive and reasonable rates would become much more difficult in light of the constant and wide fluctuations in the contribution factor. In fact, requiring service providers to build the USF contribution assessments into their standard service rates would create incentives to game the system to increase revenues and avoid USF

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<sup>52</sup> *See id.*

<sup>53</sup> *See id.* at ¶ 392.

<sup>54</sup> *See id.* at ¶ 394.

contribution obligations.<sup>55</sup> By eliminating transparency, such a result would be anticompetitive and counter to the Commission's efforts to reform the intercarrier compensation and universal service regimes.

Further regulation of USF-related line-item charges is unnecessary given the competitiveness of the communications marketplace, and the wireless market in particular. The wireless industry is dedicated to providing a high-quality customer experience, which includes ensuring customers receive clear and understandable billing statements. Indeed, customer satisfaction is a key aspect of competition that continues to spur service providers to provide accurate and complete billing information. The wireless industry has long followed the voluntary standards in the *CTIA Consumer Code for Wireless Services*, which requires clear, non-misleading disclosures in customers' bills.<sup>56</sup> Pursuant to the Consumer Code, wireless service providers disclose to customers whether any additional taxes, fees or surcharges may apply and the amount or range of such fees or surcharges that are collected and retained by the carrier. Wireless service providers also distinguish on customers' bills the service charges from any taxes, fees and other charges collected by the carrier and remitted to the government. Thus, additional regulation would unnecessarily limit carriers' flexibility and unnecessarily cause customer confusion and frustration.

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<sup>55</sup> The FNPRM notes that service providers currently are not permitted to recover interstate TRS costs through a TRS-labeled line-item charge. See FNPRM ¶ 394, n.617. The proposed TRS contribution factor for the 2012-2013 funding year, however, is merely 1.053 percent. See *Rolka Loube Saltzer Associates Submits Payment Formulas and Funding Requirement for the Interstate Telecommunications Relay Services Fund for the July 2012 Through June 2013 Fund Year*, Public Notice, CG Docket Nos. 03-123, 10-51, DA No. 12-696 (rel. May 2, 2012). In contrast, the USF contribution factor for the third quarter of 2012 is 15.7 percent, and within the past year has been as high as 17.9 percent.

<sup>56</sup> See CTIA Consumer Code for Wireless Services, available at [http://www.ctia.org/consumer\\_info/service/index.cfm/AID/10352](http://www.ctia.org/consumer_info/service/index.cfm/AID/10352). The Consumer Code's signatories cover almost 97 percent of U.S. wireless subscribers, and additional carriers have indicated they will comply with the code.

Based upon the experiences of CTIA's members, any remaining customer dissatisfaction regarding USF line-item charges primarily relates to the extremely high and variable nature of the USF contribution factor, not the way those charges are passed through to customers. Reforming the USF contribution mechanism would be a far more effective way of resolving these issues than requiring the inclusion of more information on bills that would be largely meaningless to consumers.

**B. Service Providers Should Not Be Required To Segregate Their USF Charges Into Dedicated Trust Accounts**

Although CTIA shares the Commission's concerns that it can be difficult to recover funds from a service provider that files for bankruptcy, requiring filers to segregate the USF line-item charges collected from customers into dedicated trust accounts for the sole benefit of the USF is not an appropriate solution.<sup>57</sup> According to the Commission, between 2001 and 2011 USAC was unable to collect \$80 million in funds due to service provider bankruptcies, the average of which totals approximately \$8 million in uncollected payments per year. This annual amount represents less than 0.01 percent of the current \$8.1 billion annual fund. This is but a small fraction of the unnecessary administrative and legal costs that would be incurred by service providers and USAC if all USF contributors were required to establish dedicated trust accounts. Accordingly, to the extent the Commission considers any regulations to improve its collection rates against bankrupt companies, CTIA urges the Commission to focus on requirements that are not unnecessarily and overly burdensome on service providers.

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<sup>57</sup> See FNPRM at ¶ 400.



## CONCLUSION

CTIA requests that the Commission implement contribution reform consistent with these comments.

Respectfully submitted,

By: /s/ Scott K. Bergmann\_\_\_\_\_

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